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June 14, 2016

VIA E-MAIL AND FIRST CLASS MAIL

The Hon. Karen V. Gregory
Secretary of Federal Maritime Commission
800 North Capitol St.
Room 1046
Washington, D.C. 20573

Re: Docket No. 15-11 – Ovchinnikov v. Hitrinov

Dear Ms. Gregory:

Enclosed for filing in the above-captioned matter are an original true copy and five (5) additional copies of:

1. Respondents' Response to Complainants' Motion to Dismiss.

Please contact me if you have any questions.

Sincerely,

Anjali Vohra

Anjali Vohra

Enclosures

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 15-11

IGOR OVCHINNIKOV, ET Al

v.

MICHAEL HITRINOV, ET AL

Consolidated With

DOCKET NO. 1953(I)

KAIRAT NURGAZINOV, ET Al

v.

MICHAEL HITRINOV, ET AL

RESPONDENTS' RESPONSE TO COMPLAINANTS' MOTION TO DISMISS

Respondents Empire United Lines and Michael Hitrinov hereby reply to Complainants' Motion to Dismiss (as supplemented by their belated, back-dated "status report" of June 14, 2016). To put it simply, and in Shakespearean language, Complainants' cavils are much ado about nothing. The undersigned has repeatedly informed Counsel for Complainants that Respondents have provided all of the shipping documents they could find in their possession or control. Complainants, however, persist in believing that if they apply more pressure, they can indeed extract blood from a turnip. Reality, however, is otherwise.

CORRECTED STATEMENT OF FACTS

Respondents agree with Complainants that the Presiding Officer required the production of shipping documents and that the Respondents produced shipping documents. Those are about

the only facts on which we agree. Rather than catalogue all of the mis-statements and twisted implications, however, we instead set out a brief, corrected statement of the facts.

- On May 25, 2016, the undersigned wrote to Counsel for Complainants asking whether Counsel would voluntarily make available original, electronic copies of all the shipping documents produced by Complainants, without need for a formal request. The reason for this request, as discussed in Respondents' Motion for Judgment on the Pleadings and Hitrinov Declaration attached thereto, was the number of obviously fraudulent, fabricated documents produced by Complainants. The undersigned reminded Counsel of the request a couple of days later.
- Friday evening on May 27, after work, I received Counsel's response: (i) "advis[ing]" the undersigned that all discovery requests must be made formally, (ii) asserting that Counsel would deny any formal discovery of native documents on grounds of attorney-client privilege and attorney work product, (iii) attaching a "Notice to take Deposition of all respondents by Michael Hitrinov," and (iv) claiming that "Complainants still have not yet received documents responsive" to the Order to produce shipping documents.
- The undersigned responded shortly thereafter, explaining that to the best of his knowledge, Respondents had "filed everything [they] have that is called for by the April 27 Order," and noting that I would get back to Counsel in due course about the deposition, scheduled by Complainants for 6 weeks hence, although I thought the more customary and sensible process was to defer depositions until after other forms of discovery had been used. On Memorial Day (May 30), I asked Respondents to conduct another search for the categories of documents identified by Complainants' Counsel, and informed him that I had done so.

- On June 7, 2016, Counsel for Respondents interposed a formal objection to the proposed deposition, identifying various defects in the Notice, including (i) that the FMC Rules (like the Federal Rules) do not allow opposing counsel to dictate who a company will present as its deponent, that one of the listed topics was incomprehensible, and that another was clearly precluded by the attorney-client privilege.
- Later that day, and without any conferral or even attempt to see if Respondents' renewed search had turned up anything, Complainants filed the instant motion.
- The undersigned again explained that Respondents had re-reviewed their files and found no more shipping documents within their possession and control. Respondents' Counsel added that Respondents were, on a voluntary basis, attempting to obtain some of the documents from the outside companies who did control them, but Complainants' Counsel was disinterested.

ARGUMENT

Even passing the oddity that Complainants are seeking not to enforce their own discovery request, but rather an Order of the Presiding Officer, their claims lack merit. The only cases or other authorities cited by Complainants are for the proposition that the documents called for by the Order are within the scope of discovery. At least as a general proposition, we can all agree to that unexceptionable point.

Where Complainants founder is on their unsupported and unsupportable assertion that discoverable documents must be produced, even if the party responding to them does not have such documents. That is not only ludicrous on its face, but flatly contrary to FMC Rule 206(a)(1), which like its judicial counterpart (F.R.C.P. 34), requires production only of "items in the responding party's possession, custody, or control." (Emphasis added).

Moreover, some of the items requested are not those that a shipping company would normally possess. An obvious example is import declarations, which go to the importer, not the exporter/shipper. Others have already been produced. The freight rates are evidenced by the invoices Respondents produced, which show that the rate for all cars transported under EUL's arrangement with Global Auto Enterprise was $750 per vehicle. Likewise, Respondents provided the original Titles for all four vehicles.

Turning the spotlight on Complainants' own production would suggest a much larger problem. As noted above and discussed at some length in Respondents' Motion for Judgment on the Pleadings, the "invoices" produced by Complainants are obvious fabrications, having been produced by composite manipulation of the actual invoices. And Complainants have rejected any request for native originals that would show the source of the forgery, asserting that they are somehow protected by attorney-client privilege. While we will put that to the test once document discovery commences under the Scheduling Order to be issued, we can think of no possible basis for such a claim unless Complainants' Counsel actually produced them, rather than Complainants. That, of course, would open up a whole other can of worms. Furthermore, it seems apparent that documents Complainants should have in their possession were not produced, such as the paper trail for the several instances (described in the Hitrinov Declaration) where the car originally ordered was not the one eventually sold.

Even if there were some issues, Complainants' proposed remedies, asserted without any reference to authority, are both premature and well beyond the pale of anything that a judge might possibly order, at least not before granting a motion to compel that is not complied with. Even the most modest of the extreme requests – preclusion of later use – is plainly premature and unjustified. Respondents have not attempted to use a document they have not produced.

Moreover, Respondents continue to search for additional documents, which if found will be produced. And any such preclusion would not apply to documents that Respondents do not have, but may be able to obtain from an outside source (such as MSC). Finally, if such a rule were to be applied, it would have to apply equally to documents not produced by Complainants.

Finally, Complainants' cavils about depositions are baseless. First, the purported deposition noticed by Complainants remains more than a month away – plenty of time to make any arrangements if appropriate. More fundamentally, however, the Notice of Deposition is fatally defective, as repeatedly explained to Complainants Counsel. Under FMC Rule 203(a)(6) (again like the Federal Rule), a notice of Deposition to an Organization must name only the organization, leaving it up to the Organization to "designate one or more officers, directors, . . . managing representatives or designate[d] other persons who will testify on its behalf." As the courts have held, a deposing party "cannot . . . dictate under Rule 30(b)(6) which individuals the corporation should designate, even if there is cause for [the deposing party's] position. *McPherson v. Wells Fargo Bank, N.A.*, 292 F.R.D. 695 (S.D. Fla. 2013).

CONCLUSION

For the foregoing reasons, Complainants' Motion to Compel and for other relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Response to Complainants' Motion to Dismiss by express courier to the following:

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Dated at Washington, DC, this 14th day of June, 2016.

Anjali Vohra
Counsel for Respondents